Before the
Federal Communications Commission
Washington, DC 20554

In the matter of:	)	
	)	
2018 Quadrennial Regulatory Review	)	
Review of the Commission's Broadcast	)	MB Docket No. 18-349
Ownership Rules and Other Rules Adopted	)	
Pursuant to Section 202 of the	)	
Telecommunications Act of 1996	)	
	)	

REPLY COMMENTS OF GRAY TELEVISION, INC.

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Three things in life are certain: death, taxes, and the multibillion-dollar cable and satellite industry using FCC proceedings to kneecap their chief competitor: local broadcasters. In proceeding after proceeding, the NCTA and ATVA confuse the private interests of their deep-pocketed members with the public interest. Their Comments in this latest Quadrennial Review are no different.[1] The Commission's duty, however, is simple: If a broadcast ownership rule is no longer in the public interest as a result of competition, the Commission must eliminate or modify the rule.

As the Comments of Gray Television, Inc. ("Gray") and many others demonstrate, the media market has never been more competitive or dynamic. Local broadcasters compete in an industry that is more fragmented than ever and full of competitors with deeper pockets than any time in history. Yet, NCTA and ATVA somehow maintain that local broadcasters have more power than ever and, therefore, must continue to be restrained by the Top-4 Restriction. At bottom, the complaints of NCTA and ATVA are a desperate attempt to use the Commission's

1 Comments of NCTA – The Internet & Television Association, MB Docket No. 18-349 (Apr. 29, 2019) ("*NCTA Comments*"); Comments of the American Television Alliance, MB Docket No. 18-349 (Apr. 29, 2019) ("*ATVA Comments*").

processes to maintain a competitive advantage over local broadcasters. When formulating ownership rules, however, the Commission does not consider the private interests of the members of NCTA or ATVA; instead, the public interest is paramount. And, here, the record is clear: The Top-4 Restriction affirmatively harms the public interest and must be eliminated.

INTRODUCTION AND SUMMARY

The media marketplace has never been more competitive or dynamic, and next year, undoubtedly, will usher in more changes, more competition, and more well-financed new entrants. The NCTA and ATVA do not deny these competitive realities – because they can't. Instead, in their Comments, they each maintain the same narrow focus: local broadcast stations affiliated with a Big-4 network are still too powerful and must continue to be restrained by the Top-4 Restriction. This is nonsense. All commercial broadcast television stations combined earn only a 30% share of linear television viewers.[2] Even if a local broadcaster controls all four Big-4 affiliates in a market, it will command only 30% of an MVPD's viewers, which is far below the market share that courts have deemed necessary to grant a competitor the leverage to raise prices above a competitive level.[3] The media marketplace is too fragmented and too competitive for any single player to increase its fees above a competitive level. Competition has rendered the Top-4 Restriction obsolete.

Before the Commission gives any further credence to NCTA's and ATVA's complaints, it should insist that these lobbying organizations answer one simple question: How can NCTA

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[2] *See infra* Figure 1, p. 5

[3] *Jefferson Parish Hospital Dist. No. 2 v. Hyde*, 466 U.S. 2, 26 (1984) (holding that a court cannot infer market power if 70% of customers in the market elect not to use a company's services) *U.S. v. Aluminum Co. of Am.*, 148 F.2d 416, 424 (2d Cir. 1945) (J. Hand) ("certainly thirty-three percent is not [sufficient to infer a power to raise prices]").

and ATVA claim that broadcasters have such tremendous leverage in retransmission consent negotiations when broadcasters deliver 30% of the viewers but receive only 17% of the programming fees paid by MVPDs?[4] This disparity is damning. If local broadcasters were as powerful as NCTA's and ATVA's rhetoric makes them out to be, retransmission fees would more appropriately match – or exceed – the value that local broadcasters bring. The fact that retransmission fees do not approach those levels proves that local broadcasters do not have the power to raise retransmission rates above otherwise competitive levels, and without the ability to raise prices to artificial levels, all of NCTA's and ATVA's arguments crumble.

The Comments from NCTA and ATVA are just another example, in a long list, of an industry using government regulation to stifle competition. The Commission's task, however, is not to protect the private interests of NCTA's and ATVA's members. Instead, it must remove outdated regulations that are no longer necessary in the public interest, and on that count, the record is clear. The Top-4 Restriction is affirmatively harmful. In market after market, where broadcasters have been able to combine two or more Big-4 affiliates, viewers and advertisers have benefited, and the public interest was served. Given that clear track record of success and given the ever increasingly competitive media market, the Commission must finally eliminate the Top-4 Restriction.

I. As a matter of Sound Economics, Combinations of Big-4 Affiliates in a Local Market Do NOT Result in Supra-Competitive Retransmission Fees.

NCTA and ATVA urge the Commission to prohibit any combination of major broadcast network affiliates because they claim it will result in "artificially higher" or "supra-competitive"

4 *See infra* Figures 1-2, pp. 5-6

retransmission consent fees.[5] Therefore, any such combination is per se harmful to the public interest. This simplistic analysis is nonsense. But, more importantly, it ignores the realities of the media marketplace.

By any measure, broadcast consolidation has not led to retransmission fees that are "artificially higher" or "supra-competitive." To be sure, retransmission consent fees have increased over the last several years, but when determining whether a price is above a competitive level, the Commission must take into account the value the product brings.[6] An increase in price is not proof of anticompetitive behavior or excessive market power if it more accurately reflects the value of the product.[7]

The best evidence of the value of broadcast programming is its ratings, and broadcast programming remains by far the most popular programming available on any cable or satellite system. For the 2018-2019 television season, 88 of the top 100 rated primetime television series (i.e., excluding one-time specials such as the Super Bowl or Oscars) were on broadcast television,[8] and 92 of the top 100 individual primetime television programs with the most total viewers were also on broadcast television.[9] Moreover, whenever a program appears on both broadcast television and cable television, the broadcast version almost always delivers a

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5 *See NCTA Comments* at 3, 6; *ATVA Comments* at 24.

6 *Ohio v. Am. Express*, 585 U.S. __ (2018), slip op. at 16.

7 *Id.* (explaining that American Express charges higher fees not due to anticompetitive conduct but to reflect the more valuable cardholders that it delivers to merchants).

8 Michael Schneider, *100 Most-Watched TV Shows of 2018-2019: Winners and Losers*, VARIETY (May 22, 2019) *available at* https://variety.com/2019/tv/news/most-watched-tv-shows-highest-rated-2018-2019-season-game-of-thrones-1203222287/.

9 Rick Porter, *The Top 100 Primetime Telecasts of 2018*, HOLLYWOOD REPORTER (Dec. 31, 2018), *available at* https://www.hollywoodreporter.com/live-feed/top-100-primetime-telecasts-2018-1170761.

significantly larger audience. For example, for the last several years, the NCAA Men's Basketball Tournament Championship airs on CBS in odd years and TNT in even years. The total viewers for the program in odd years when it airs on CBS always trounce the total viewers in even years when the same program airs on TNT.[10] Put simply, no one delivers large, mass audiences like broadcasters, and that provides added value to MVPDs.

The retransmission fees that broadcasters charge MVPDs, however, significantly under-index for the value broadcasters bring. In 2019, broadcasters are earning approximately 30% of all viewers on cable and satellite systems, yet retransmission fees account for only 17.7% of the programming fees that cable and satellite operators pay.[11] The other 82.3% of programming fees that MVPDs pay are to much lower-rated national cable networks and regional sports networks.

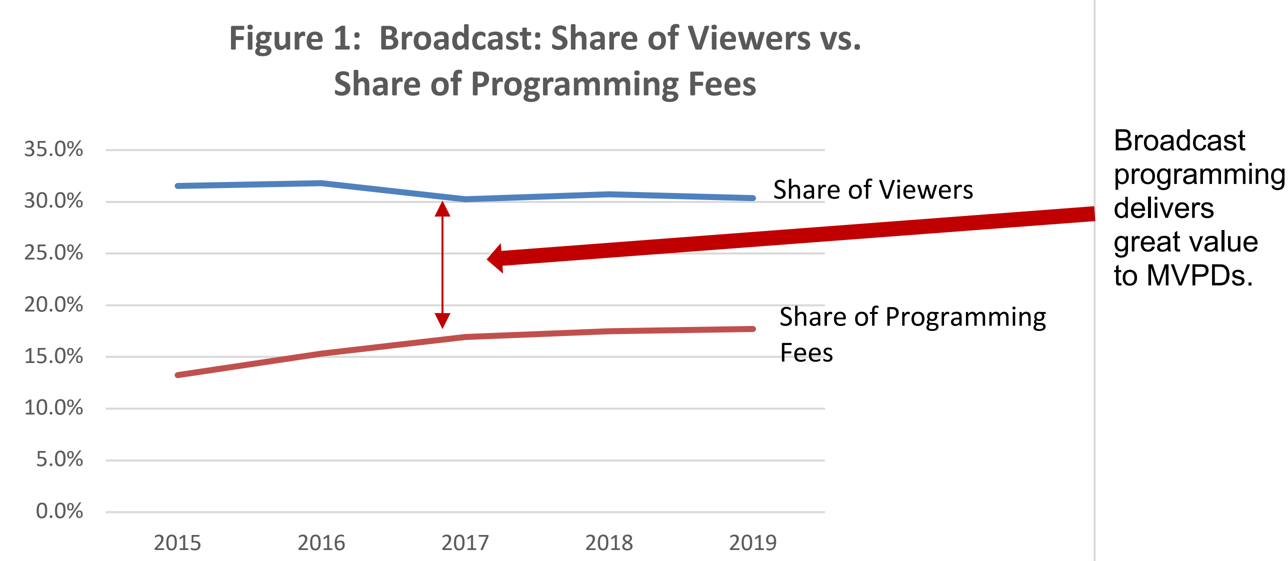

Figure 1: Source: Kagan, a media research group within S&P Global Market Intelligence

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10 Joe Otterson, *NCAA Championship Game Viewership Drops 28% from 2017*, VARIETY (Apr. 3, 2018) (explaining that ratings for the championship game drop in odd years when appearing on TNT) *available at* https://variety.com/2018/tv/news/2018-ncaa-championship-game-ratings-1202742895/.

11 *See infra* Figure 2, p. 6

If NCTA wants to know who to blame for increasing programming fees, it should look in the mirror. From 2015 to 2019, the fees charged by regional sports networks and national cable networks (many of whom are NCTA members), increased by almost $8 billion. Meanwhile, over the same period of time, broadcast retransmission fees increased by $4.3 billion. In other words, from 2015 to 2019, the increase in programming fees for basic cable networks and RSNs was 83.3% <u>higher</u> than the amount that retransmission fees increased.

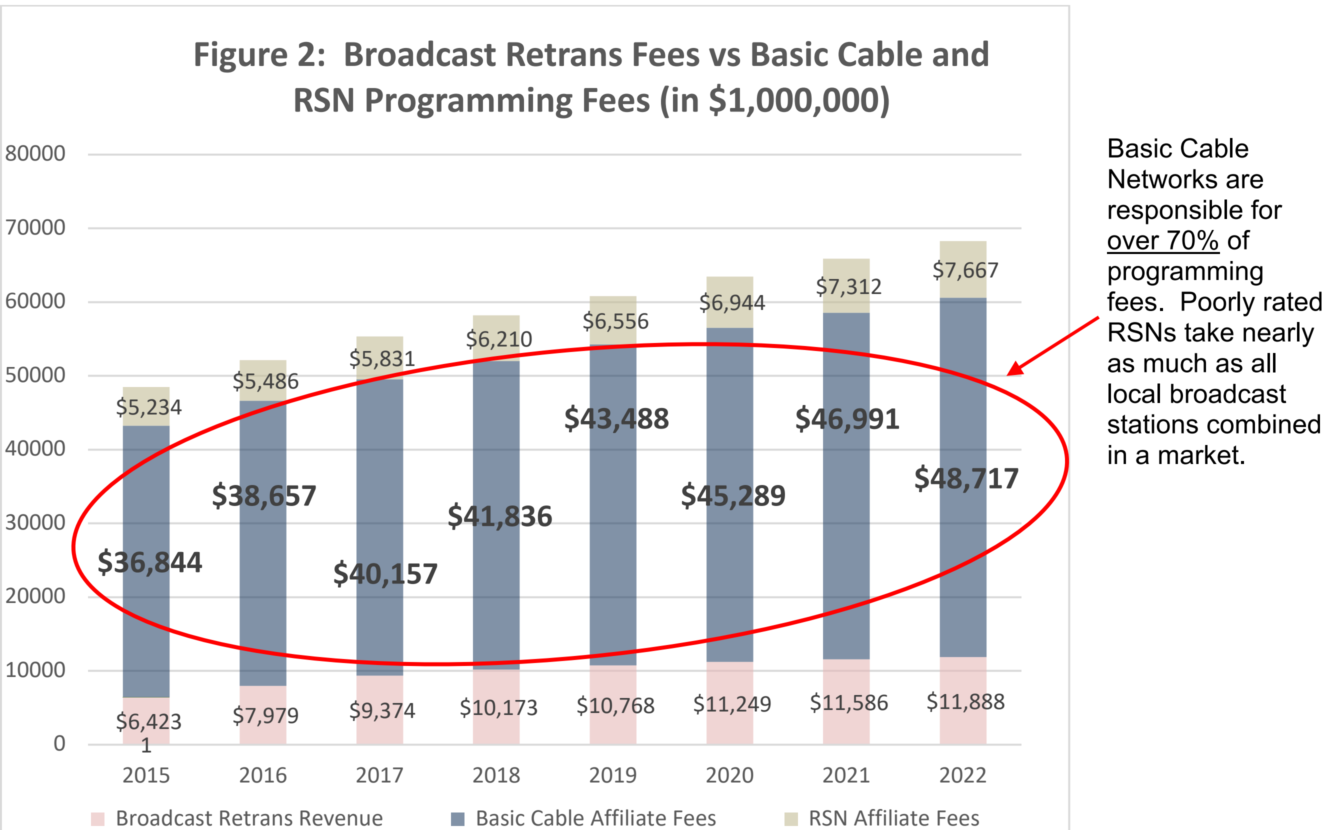

Figure 2: Source: Kagan, a media research group within S&P Global Market Intelligence

Despite the fact that broadcast retransmission fees are significantly lower than the value broadcasters deliver, NCTA and ATVA repeatedly trot out claims that broadcasters are charging inflated prices to scare the Commission into continuing to hamper local broadcast stations with onerous regulations that apply to no other segment of the media or entertainment industry. Reasoned decision making, however, requires that the Commission do more than simply regurgitate NCTA's and ATVA's assertion that controlling two Big-4 affiliates somehow results in the ability to charge supra-competitive prices.[12] Instead, given today's oversaturated media marketplace with hundreds of different television networks and countless options for news, sports, and entertainment, the Commission must adequately explain how controlling more than one Big-4 affiliate actually gives a broadcaster the power to raise prices above an otherwise competitive level.[13]

To determine if prices are indeed artificially higher or supra-competitive, the Commission must find that broadcasters have "market power" because market power is a necessary precondition to sustainably raise prices above competitive levels.[14] And, to find market power, the Commission must define the market.[15] Once the market is defined, courts will

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12 *Am. Fed'n of Gov't Emps., Local 2924 v. Fed. Labor Relations Auth.*, 470 F.3d 375, 380 (D.C. Cir. 2006) ("We will uphold the Authority's decision 'if, but only if, we can discern a reasoned path from the facts and considerations before the [agency] to the decision it reached.'").

13 NCTA and ATVA both cite the Commission's 2014 *Report & Order* prohibiting the joint negotiation of retransmission consent agreements among Big-4 affiliates that are not commonly owned. *See Amendment of the Comm'n's Rules Related to Retransmission Consent*, 29 FCC Rcd 3351 (2014). That 2014 decision, however, relied on economic studies from 2009 and 2010. *See id.* n. 50, 51, 52, 53, & 56. Those studies were conducted in a different media environment from today, and several years before OTT services like Netflix began producing their own original content. NCTA and ATVA also cite the Competitive Impact Statements by the Department of Justice that were part of the Department's approval of Gray's acquisition of Raycom and Nexstar's acquisition of Media General. Those Competitive Impact Statements, however, contain no economic studies or evidence whatsoever and are of dubious value here.

14 *Jefferson Parish Hospital District No. 2 v. Hyde*, 466 U.S. 2, 27 n.46 (1984) ("[A]s an economic matter, market power exists whenever prices can be raised above the levels that would be charged in a competitive market.").

15 McWane, Inc. v. FTC, 783 F.3d 814, 828 (11th Cir. 2015) ("Defining the market is a necessary step in any analysis of market power . . . ." (quoting U.S. Anchor Mfg., Inc. v. Rule Indus., Inc., 7 F.3d 986, 994 (11th Cir. 1993))).

analyze a competitor's market share to determine if it has market power.[16] While there may be no hard and fast rule for when too much market share gives a competitor market power, a share around 30% is plainly insufficient to infer market power.[17]

The Commission cannot reasonably find that controlling multiple Big-4 affiliations confers market power or the ability to artificially raise retransmission consent fees. When MVPDs purchase programming to offer to customers, they choose among all linear television networks, including national cable networks, regional sports networks, independent local television stations, local affiliates of the Big-4 networks, and other local television stations. Each of these programming options charge different fees based on the perceived value of their programming. Today, MVPDs also are integrating OTT services within their bundles, including allowing for seamless integration with Netflix, Hulu, and Amazon Prime, giving MVPDs more programming options and further reducing their reliance on broadcasters. The hundreds of linear television networks and the exploding universe of OTT offerings that are being integrated into MVPD platforms are the relevant market because this is what consumers regularly choose among with just the click of a remote control. But, even if we restrict the market to just the hundreds of linear television networks offered by MVPDs, all broadcasters combined earn only 30% of the viewership.[18] At any given time, 70% of an MVPD's customers are watching some other programming, and this does not include the millions of viewers who have opted out of the traditional linear television universe and instead are watching Netflix, Amazon Prime, Hulu,

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16 *Eastman Kodak Co. v. Image Tech. Servs., Inc.,* 504 U.S. 451, 467 (1992) ("The existence of such power ordinarily is inferred from the seller's possession of a predominant share of the market.").

17 *Jefferson Parish* at 26 (holding that a court cannot infer market power if 70% of customers in the market elect not to use a company's services).

18 *See supra* p. 5.

YouTube, or some other new non-linear video programming competitor.[19] The Commission cannot reasonably find that owning all four Big-4 affiliations in a market results in market power and the ability to raise prices to supra-competitive levels when 70% of viewers of linear television are watching something else. Indeed, the Commission can no longer reasonably conclude that broadcasters have "must-have" programming when many new OTT competitors have decided against carrying broadcast channels at all [20] and some traditional MVPDs have decided that video programming as a whole, including broadcast, is no longer "must have."[21] These large, sophisticated distributors, who are willing to proceed without broadcast programming, significantly check any broadcaster's attempt to raise prices above competitive levels.

The Commission also cannot reasonably infer that broadcasters have market power from the fact that all broadcast stations combined account for only 17% of the programming fees charged to MVPDs. If broadcasters have market power, they are doing a lousy job of negotiating agreements and exercising their market power. Instead, the only rational conclusion is that broadcasters do not have market power, and, even in markets where a single broadcaster owns

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[19] These OTT-only subscribers are expected to represent between 13% and 24% of the marketplace by 2024 – further proof of the rate at which the marketplace is fractioning. Jon Lafayette, *OTT-Only Subs Could Reach 15.5M Homes by 2024: Report*, BROADCASTING & CABLE (Feb, 21, 2019) *available at* https://www.broadcastingcable.com/news/ott-only-subs-could-reach-15-5m-homes-by-2024-report.

[20] In the vast majority of its markets, Sling (which is owned by ATVA member DISH Network) does not offer local broadcast channels. Similarly, Pluto TV also does not offer local broadcast stations.

[21] Most notably, Cable One has loudly proclaimed its strategy to deemphasize video programming and has publicly stated that it is "happy" to have its subscribers obtain video from OTT players. Jeff Baumgartner, *Cable One 'Happy' to See Broadband Subs Go with OTT-TV*, LIGHT READING (Feb. 28, 2019) *available at* https://www.lightreading.com/cable/cable-one-happy-to-see-broadband-subs-go-with-ott-tv-/d/d-id/749815.

three or more Big-4 affiliates, the broadcaster still will not have market power. Without market power, broadcasters cannot raise prices to supra-competitive levels, and without these supposedly "artificially higher" retransmission fees, the rest of the NCTA's and ATVA's arguments crumble.

Broadcasters charge high retransmission fees because their programming is valuable, but there is a difference between controlling valuable programming and amassing enough valuable programming to obtain the power to actually raise prices to a supra-competitive level. In today's fractured media environment, a company would need to own far more than just the four local Big-4 affiliates to obtain market power.

II. NCTA and ATVA Prove They Have No Concept for the Public Interest Because Big-4 Duopolies Undeniably Have Benefited Consumers, Viewers, and Advertisers.

ATVA's comments prove that the organization has no concept for what the public interest means. Remarkably, ATVA claims that it is "aware of no evidence that [a Big-4 duopoly] would produce countervailing benefits."[22] To help educate ATVA, Gray points ATVA to pages 14-17 of Gray's Comments where Gray provided dozens of public interest benefits that accrued from several Big-4 duopolies that Gray formed over the last five years. The benefits have included preserving local news in Grand Junction, Colorado; adding weekend news in Rapid City, South Dakota; upgrading CBS to high definition in Laredo, Texas; adding a 9:00 pm news in Bismarck, North Dakota; upgrading FOX programming from analog to HD digital in Willison and Dickinson, North Dakota; making CBS programming available over the air in Biloxi, Mississippi; adding local news and local sports specials in Wausau, Wisconsin; and significantly increasing local news in Lincoln, Nebraska. Gray would further point ATVA to

22 *ATVA Comments* at 13.

Gray's pending application to acquire NBC affiliate KDLT(TV) in Sioux Falls, South Dakota. In that application, Gray explained that if Gray is permitted to combine its two top-four stations in the Sioux Falls DMA, Gray would use the combined broadcast facilities for both stations to provide over-the-air service for either NBC or ABC programming for 80,000 households that cannot receive such programming today; significantly expand local news offerings on both stations; add weekend news in the market; increase the supply of local advertising inventory available for sale to local advertisers in Sioux Falls, which necessarily will put downward pressure on advertising rates; and open the only television local news bureau in the state capital of Pierre. Put simply, the benefits from duopolies are real. ATVA's real gripe is that these benefits accrued to the viewing public and not to ATVA's multibillion-dollar member companies.

NCTA makes a similar error as ATVA. NCTA cites Gray's stations in Harrisonburg, Virginia as a "striking example" of the horrors of a broadcaster owning multiple Big-4 affiliates in a market.[23] Gray owns the only commercial, full-power television station in Harrisonburg, ABC affiliate WHSV-TV. In 2006, Gray added a Fox affiliation to WHSV-TV's digital multicast channel. Prior to 2006, FOX programming, including most Washington Redskins football games, was not available over the air to Redskins fans in the nearby Shenandoah Valley.[24] Today, viewers can watch NFL games and other FOX programming over the air via Gray's Class A station WSVF-CD. In addition to live sports, Gray's FOX affiliate relies on WHSV-TV's resources to offer a local newscast in primetime at 10:00 pm and a local morning

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[23] *NCTA Comments* at 10.

[24] Although most MVPDs in the Harrisonburg DMA historically carried FOX affiliate WTTG(TV), Washington, DC, WTTG's signal does not extend beyond the Blue Ridge Mountains into the Shenandoah Valley.

news from 7:00 am to 9:00 am when the other major networks are airing national morning news programming. Without WHSV-TV, it is extremely unlikely that a stand-alone FOX affiliate in DMA #175 could afford to offer any local news programming. In 2012, Gray obtained a CBS affiliation and added it to a multicast channel for its Class A station WSVF-CD. Again, before Gray began providing CBS programming, it was not available over the air in the Shenandoah Valley.[25] In other words, before Gray began broadcasting CBS and FOX programming on WSVF-CD and on WHSV-TV's multicast channel, to watch the NCAA Tournament, the NFC football package, the AFC football package, the SEC football game of the week, the MLB All Star Game, the Super Bowl two out of every three years, or any other FOX or CBS programming, a viewer in the Shenandoah Valley had to pay one of NCTA's or ATVA's member companies to subscribe to cable or satellite service to receive an out-of-market FOX and CBS affiliate and receive "local" news from two hours away in Washington, DC.

Local advertisers in the Shenandoah Valley also are much better off. Prior to 2006, local advertisers could advertise on WHSV-TV's ABC affiliate or on Comcast cable. By adding a new FOX affiliate and CBS affiliate to the market, Gray added more than 3,600 additional local advertising spots per week to the market, which has dramatically increased the supply of local advertising units available for sale. This increase in supply placed tremendous downward pressure on advertising rates in the Harrisonburg DMA. By adding FOX and CBS to the market, advertisers are much better off because they have more choices and more options for reaching

[25] Before Gray provided CBS programming on a multicast channel for WSVF-CD, most MVPDs in the Harrisonburg DMA imported WUSA-TV from Washington, DC to provide CBS network programming. WUSA-TV's over-the-air signal also does not extend beyond the Blue Ridge Mountains to reach viewers in the Shenandoah Valley.

local viewers, and, with the substantial increase in local advertising inventory, they have more leverage to negotiate better prices.

Both NCTA and ATVA also cite Gray's combination of WRDW-TV (CBS) and WAGT-CD (NBC) in Augusta, Georgia as an example of Gray manipulating the Commission's ownership rules with ATVA labeling it as "egregious,"[26] but both lobbying groups ignore what would have happened to viewers in Augusta without this combination. Historically, the NBC affiliate for the Augusta market was full power station WAGT-TV, a distant third-place station on a UHF channel competing against two entrenched VHF stations. For two decades the station's prior owner attempted to improve the local news product on WAGT-TV, but the station continued to lose money. By 2016, WAGT-TV was worth substantially more in the FCC's Incentive Auction than as a television station. Therefore, Gray sold the license for WAGT-TV – exactly as Congress and the FCC intended and exactly as any rational owner would have done. The market could not support WAGT-TV as a stand-alone station. It was losing money. Its sale in the Incentive Auction was the inevitable consequence (and desired policy outcome) of the legislation authorizing the Incentive Auction.

To ensure that NBC programming remained available over the air in Augusta, Gray acquired Class A station WAGT-CD and moved WAGT-TV's programming to this station. Gray also simulcasts WAGT-CD on a multicast channel for full power station WRDW-TV, so viewers beyond the WAGT-CD contour also can continue to receive NBC programming.

If the Commission had followed NCTA's and ATVA's advice and prohibited Gray from moving the NBC programming to its Class A station or to a multicast channel, viewers in Augusta would no longer have NBC programming. To watch the Winter or Summer Olympics

[26] *NCTA Comments* at 10; *ATVA Comments* at 17.

or Sunday Night Football or any other NBC programming, viewers in Augusta would have been forced to pay one of NCTA's or ATVA's member companies to import NBC programming from another market. While that certainly would serve their members' private interests, it would not serve the public interest.

By combining the operations of WRDW-TV with WAGT-CD, Gray has significantly improved the local programming that now is available in the market. With the economies of scale from operating two television stations in the market, Gray has expanded its morning local newscasts to start at 4:30 am and added local newscasts at 4:00 pm and 7:00 pm. All in all, because of this expansion, Gray has more news employees today than the number of news employees that were dedicated to WRDW-TV and WAGT-TV in 2015 before Gray acquired the station. Moreover, because these newscasts replaced syndicated programming or paid programming, Gray was able to sell all of the ad inventory in these expanded news hours to local advertisers without sharing any of the ad inventory with a syndicator.[27] As a result, thanks to Gray's common ownership of WRDW-TV and WAGT-CD, Gray was able to expand its local news offering and now sells approximately 60 extra ad units each week to local advertisers. By increasing the supply of local advertising inventory, Gray has placed further downward pressure on local advertising rates to the direct benefit of local advertisers.

Despite NCTA's and ATVA's best efforts, Augusta proves Gray's point about the benefits of duopolies and the harms from the Top-4 Restriction. As a stand-alone station, WAGT-TV was not profitable, and its NBC programming would have disappeared from the

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[27] As Gray explained in its Comments, syndicators typically retain several commercial units within each program and sell those units on their own behalf to national advertisers. Meanwhile, because Gray owns 100% of the ad units in its local news, any time Gray replaces syndicated programming with local news Gray recaptures those advertising units and can make those additional units available for sale to local advertisers. *See Gray Comments* at 3, 11.

market entirely. Yet, today, because Gray moved WAGT-TV's programming to its Class A station, Gray produces more news and has more news employees than either station did before the combination, and Gray offers more local ad spots for sale to local advertisers than before. Viewers and advertisers undeniably are better off today. Gray's successes in Augusta and Harrisonburg and the seven other markets that Gray highlighted in its Comments can be replicated in Small Markets across the country, but for that to happen, the Commission must eliminate the Top-4 Restriction in all markets and allow broadcasters to compete on an even playing field with much larger and better financed competitors.

III. NCTA's and ATVA's Comments Are a Desperate Attempt to Use Government Regulation to Continue to Hamper Their Chief Competitor.

The history of competitors using government regulation to stifle competition and innovation is about as old as the history of regulation itself. Whether it is the taxi cab industry attempting to regulate Uber and Lyft out of existence or the horse and buggy industry in the late 1800's pushing "Red Flag" laws to stifle the emerging automobile industry,[28] competitors will always seek to use government regulation to punish their adversaries, stifle competition, and thwart pro-consumer innovation. The Commission's task is to separate those calls for regulation that truly benefit the public interest from regulations that exist to benefit the private interests of a multibillion-dollar industry. The Top-4 Restriction has long since outlived its usefulness. Its only purpose today is to prevent broadcasters from better competing against MVPDs.

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28 In the late 19th Century, various laws were passed in the United Kingdom and United States – ostensibly for traffic safety – that hampered the emerging automobile industry. Some of these Red Flag laws required a pedestrian to walk in front of any self-propelled vehicle waving a red flag to warn others or livestock of an approaching vehicle. *See*, *e.g.*, Chris Higgins, *Ridiculous U.K. Traffic Laws of Yore* (Nov. 22, 2015) *available at* http://mentalfloss.com/article/71555/ridiculous-uk-traffic-laws-yore.

Make no mistake, NCTA's and ATVA's members are among local broadcasters' chief competitors, and their Comments must be viewed with that lens. Local advertising remains the most important source of revenue for most broadcasters, and cable systems and other MVPDs are a major competitor for local advertising dollars. When broadcasters add new multicast channels with popular Big-4 programming, as Gray has done in Harrisonburg, Virginia and other markets, it makes the broadcaster a more formidable competitor to the local cable system. In Harrisonburg, Comcast sells advertising on dozens of popular cable networks, including ESPN, FOX News, USA, Comedy Central, and many, many others: Comcast's own advertising materials tout its ability to reach 74% of Harrisonburg viewers.[29] Yet, NCTA complains when Gray adds FOX and CBS to its heritage ABC affiliate in the market to compete for the 21% of viewership in the Harrisonburg DMA that is associated with broadcast channels.[30]

NCTA and ATVA also have an interest in ensuring that as many viewers as possible subscribe to an MVPD to pay for programming instead of cutting the cord and receiving programming over the air. No wonder ATVA would claim it sees no benefits from Big-4 duopolies, including the many instances where Gray has added Big-4 affiliations to low power stations and multicast channels in markets that previously did not have a local affiliate. In Harrisonburg, Virginia until Gray added FOX and CBS, if a viewer wanted to watch the NFL on Sunday afternoons, he had to pay a monthly subscription fee to an ATVA or NCTA member. Today, viewers in Harrisonburg – and the many other markets where Gray has added new Big-4

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29 Comcast Spotlight, Market Summary Report: Harrisonburg *available at* https://www.comcastspotlight.com/markets/harrisonburg. In addition to reaching substantially more viewers than Gray's stations, Comcast also can target its advertising to two different geographic zones within the Harrisonburg DMA (Harrisonburg and Staunton), which is something Gray currently cannot do with its broadcast stations.

30 *Id*. The remaining viewership is for "premium" channels like HBO and Showtime.

affiliations to LPTV or multicast channels – are no longer captive to NCTA's and ATVA's members if they want to watch broadcast network programming. While it may not have benefited the private interests of MVPDs, making these Big-4 networks available over the air for the first time certainly benefitted the viewing public.

Broadcasters also compete against NCTA's and ATVA's members when it comes to acquiring top-rated programming. If NCTA and ATVA can hamper local broadcasters and make it more difficult for broadcasters to pay for high profile sports and entertainment programming, like the upcoming NFL renewals in 2021 and 2022, that programming will migrate to unregulated sources that can more easily pay the high fees that programming will command. Again, NCTA's and ATVA's members will benefit, but the public will not. NCTA's members will be competing against one less bidder for that programming, and, if this high-profile programming moves to ESPN, FOX Sports, or TNT, NCTA's and ATVA's members will sell the advertising.

All in all, NCTA's and ATVA's efforts should be seen as what they are: a transparent attempt by a multibillion-dollar industry to hamstring their competitor and keep the spoils for themselves. The media marketplace is as competitive and dynamic as it has ever been. The MVPDs know this is true. Therefore, to give themselves a competitive advantage, they are fighting to saddle their key competitor with regulations that apply to no one else.

CONCLUSION

As Gray explained in its Comments, meaningful broadcast deregulation is long overdue. If the Commission continues to maintain the Top-4 Restriction, local broadcast stations – especially in Small Markets – will go the way of the newspaper industry. The Commission had an opportunity to save local newspapers in the early 2000s, but it failed. It must not follow the advice of the NCTA and ATVA and make the same mistake again by clinging to old regulations that make no sense in 2019.

Respectfully submitted,

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